NO. 22484✓

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DEE LARSEN,

JUL 24 1968

Appellant,

vs.

ORVIL STILES, Acting Warden of the Idaho
State Penitentiary, STATE OF IDAHO,

Appellee

APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

HONORABLE RAY MCNICHOLS, UNITED STATES
DISTRICT JUDGE

APPELLEE'S BRIEF

AN G. SHEPARD
RNEY GENERAL
TE OF IDAHO

ER B. WRIGHT
UTY ATTORNEY GENERAL
E OF IDAHO

LLYN DINGEL, JR.
IAL ASSISTANT ATTORNEY GENERAL
E OF IDAHO
Bank of Idaho Building
e, Idaho

RNEYS FOR APPELLEE

JOHN R. BLACK
ATTORNEY AT LAW
POCATELLO, IDAHO

RICHARD R. BLACK
ATTORNEY AT LAW
POCATELLO, IDAHO

ATTORNEYS FOR APPELLANT

FILED

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STATUTORY PROVISIONS

APPELLEE'S STATEMENT OF CASE

In Appellant's statement of the case many facts are merated which are not pertinent to the instant appeal. He fers especially to the role one Richard Burt played at the al level. The sufficiency of evidence to convict Larsen in state trial court is not before this Court. Appellee further agrees with Appellant's statement that the principal evidence n which he was convicted was Richard Burt's testimony and the tements given to the law enforcement officers on his return p from Las Vegas, Nevada to Pocatello, Idaho. The purpose this appeal should not be a federal appellate review of te court evidentiary matters lacking federal constitutional lations. However, Appellee should note in light of Appellant's ning remarks that other principal evidence against Larsen adduced at the state trial. As an example, one Michael hell, a school acquaintance of Appellant, testified that Larsen d him that, "I have a perfect murder planned," and that Larsen rther stated that he would pick up a girl after a local radio tion dance and take her out and kill her. (Tr. 441) Larsen itted that the last evening he saw the deceased alive was same evening he went to the KSNN dance to see if there were girls there he knew. (Tr. 361) He left the dance and drove the street and picked up the deceased. (Tr. 363, 700-701) opinion of the Supreme Court of Idaho and federal District dge Ray McNichols' first Memorandum Order contains a concise tement of the facts. (Tr. 65-78; 820-824; State v. Larsen Idaho 42, 415 P.2d 685) Appellee in the argument in the

stant brief makes further reference to salient facts.

Appellee should draw to the Court's attention that this peal is concerned with Appellant's second Petition for Writ of beas Corpus. Appellant's first petition was filed December 7, 66. The action was dismissed by Judge McNichols on April 24, 67, after considering the entire state court record after the rties stipulated that a hearing and oral argument were not quired. (Tr. 6, 820-824) Appellant never instituted a timely peal from that order. (Tr. 1317-1322)

ARGUMENT

I

(a)

Appellant in Specification of Error No. 1(b) claims federal trial court erred in refusing to consider any retro- ive application of the rules announced in Miranda v. State of zona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). eral District Judge Ray McNichols has in effect twice adjudi- ed this contention. Appellant's first petition for Writ of eas Corpus contained this request. (Tr. 6-9) Upon referring to conviction of first degree murder and subsequent sentencing on ember 18, 1964, Judge McNichols held that in regard to the st petition any prospective application of the Miranda decision the Appellant was clearly foreclosed by Johnson v. State of Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 882 (1966). . 822-824) Judge McNichols later noted that Appellant raised same issue in his second petition for Writ of Habeas Corpus. er examining the proposed additional authorities he again cluded that Miranda offers no solace to Larsen. Appellant's al preceded Miranda and thus Johnson effectively blocked any iance on Miranda. (Tr. 1317-1319) Appellant's success in the tant appeal is barred by the same rule.

(b)

Appellant in Specification of Error No. 1(c) contends t the federal trial court erred in disproving the admission of riminating statements of Appellant in light of Escobedo v. te of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 64). Appellant's first petition for Writ of Habeas Corpus

fore Judge McNichols urged enforcement of his Escobedo rights der the Fifth Amendment to the Constitution of the United States. r. 6-9) Judge McNichols having before him the entire state urt record rejected the contention of any violation. (Tr. 820-24) e Idaho Supreme Court discussed at length the Escobedo argument. r. 68-71) State v. Larsen, 91 Idaho 42,44-46; 415 P.2d 685, 7-89. Larsen again plead in his second petition for Writ of beas Corpus his lack of protection of the Fifth Amendment. r. 827) Judge McNichols in his order denying the petition und no reason to reverse his prior decision. (Tr. 1317-22)

(c)

Appellant suffers grave appellate problems in that he never ely appealed his denial of his first petition, but sought her to institute an identical new proceeding.

Judge McNichols stated:

> "For reasons best known to the petitioner and his counsel, no timely appeal was taken from the denial of relief in the prior proceeding... Petitioner's complaint now, after appeal time has passed, and where no timely motion for amendment or other relief was sought, that the Order was not sufficiently specific is without merit. Suffice to say the Court specifically denied relief and the petitioner had his remedies." (Tr. 1317-1319)

Judge McNichols also turned to the judicial discretion ted in him by virtue of 28 U.S.C. §2244 to conclude that he is required to entertain successive applications by state-held

isoners seeking Habeas Corpus relief. Thus, as to the issues
Escobedo and Miranda he found no good cause requiring their
consideration. (Tr. 1319-20) Appellee finds no argument advanced
Appellant's opening brief that supports any theory suggesting
abuse of discretion by Judge McNichols.

(d)

Appellant devotes the major portion of his brief to the
ntention that certain statements made to the Law Enforcement
ficers H. E. Parker and Robert Aikens were not voluntary and
the product of his free and rational choice. Admittedly,
is v. State of North Carolina 384 U.S. 737, 86 S.Ct. 1761,
L.Ed.2d 895 (1966) holds that the absence of rights enumerated
Miranda are factors in considering the voluntariness of state-
nts later made. Federal District Judge Ray McNichols remarked
ht the Miranda violation in the instant case was the interro-
ion of Larsen by Officers Parker and Aikens after Larsen had
dicated he wished to speak to his attorney before making any
tement. (Tr. 822-23)

Appellant states that the trial judge made no ruling
on the issue of the voluntariness of the statements. Judge
ichols stated that he had examined petitioner's proposed
ditional authorities including the claim that the Miranda
lding had been enlarged so as to include him. Judge McNichols
ncluded that his prior holding was not in error. (Tr. 1318-19)

The federal appellate courts are empowered to approach
question:

> "We approach this question from an independent
> examination of the whole record, our established

practice in these cases." Clewis v. State of Texas, 386 U.S. 706, 708, 87 S.Ct. 1138, 1139 (1967).

In Johnson v. Commonwealth of Massachusetts, 88 S.Ct. 1155 168) the Supreme Court of the United States dismissed the Writ of etiorari as improvidently granted. Mr. Justice Marshall in isenting in concert with the Chief Justice and Mr. Justice Fortas, tted:

> "Yet, once he concluded there had been no physical abuse, the trial judge did not go on to consider the voluntariness of petitioner's confession in light of 'the totality of these circumstances,' Greenwald v. Wisconsin, 88 S.Ct., at 1154, under which it was obtained. While the Supreme Judicial Court stated that petitioner should have raised at trial the theory of involuntariness on which he now relies, its opinion reveals that it then went on to pass on that evidence itself, in the course of ruling on petitioner's request for a new trial, and found the confession voluntary. Accordingly, I do not feel that it is necessary for us to decide whether the trial judge was under a duty sua sponte to consider a theory of involuntariness not initially raised by petitioner, since it appears that such facts were considered and passed on in the course of appellate review in the state court."
>
> 88 S.Ct. at page 1157.

Larsen, in his appeal to the Supreme Court of Idaho, ed strenuously that his statements were the result of coercion duress and thus involuntary. At three stages in his opening

ef that specific point was explored. (Tr. 699, 729, 746) The preme Court of Idaho squarely met the issue of voluntariness Larsen's answers to the officers' inquiries:

> "At the outset it is to be noted that Larsen's responses to the Sheriff's questions were *entirely voluntary* and in no way attributable to coercion, or the physical conditions attending the trip. At the trial, Larsen, on cross examination, *repeatedly stated this to be the fact*. Some of his testimony in this regard is set forth in the footnote." (Emphasis added) (Tr. 67; *State v. Larsen*, 91 Idaho 42, 44, 415 P.2d 685 687)

The Supreme Court of the United States decisions of *Davis* n *Clewis* both refer to the "swearing contest" between the cused and law enforcement officers:

> "As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogations." *Clewis v. State of Texas,* 386 U.S. 706, 708; 87 S.Ct. 1338, 1339 (1967)

However, the instant case is devoid of any conflict in timony concerning circumstances surrounding the statements that e given. Larsen fully admitted at the state trial that any tement elucidated from him was devoid of duress or coercion. Idaho Court quoted in detail Larsen's remarks concerning his oluntariness claim:

"Q And we don't have any element of coercion or that you made the answer that you say you made because you were uncomfortable and handcuffed or anything like that, do we?

"A No, sir. We don't.

"Q* * * Now your answer was not--your answer to their question as you have related it was not due to any discomfort or anything of that nature at this time, was it?

"A I don't believe any of my answers were due to discomfort especially * * *

* * * * *

"Q All right. At this point now we don't have involved here that your answer to this question was prompted by the fact you were manacled and may have been cold outside or anything of that nature, do we, or cold inside?

"A No, sir. * * *

* * * * *

"Q And this doesn't have anything to do, does it, with whether or not you had had a cup of coffee, hadn't had a cup of coffee, whether you had been to the restroom or hadn't been to the restroom, does it?

"A I can't say directly that it did; no, sir.

* * * * *

"Q Now again your reply to that question was not based on any fact that you were handcuffed or that you--the method in which you were transported to Pocatello, was it?

"A No, sir. Not due to the method I was being transported; no, sir.

"Q In other words, actually that didn't have any bearing at all in your reply to these questions, did it?

"A No, sir. The transportation itself didn't.

* * * * *

"Q And there isn't any element of duress or anythink of that involved in the matter at all, is there?

"A No. I don't believe so."

(Tr. 67-68; State v. Larsen 91 Idaho 44, 415 P.2d 685, 687)

Actually, the only conflict in testimony concerned both rsen's and the Officers' recollection of the context and wording f the statements rather than the involuntariness claim. (Tr. 384-85)

"Q. So then the only thing we have involved here, Mr. Larsen, is that there is a difference in testimony between what Sheriff Parker says and what Deputy Sheriff Aikens says as to your reply to their questions, and what you say you said, isn't that right?

"A. Yes, sir. I believe so.

"Q. And there isn't any element of duress or anything of that involved in this matter at all, is there?

"A. No. I don't believe so." (Tr. 385)

Many of the facts surrounding this claim are set forth curately by the Idaho Supreme Court in their opinion and by deral Judge McNichols in his Memorandum Order. (Tr. 66-67 and

1-22, State v. Larsen, 91 Idaho 42, 43, 44; 415 P.2d 685, 6-87)

The trip from Las Vegas, Nevada, to Pocatello, Idaho, nsumed approximately nine and one-half hours. The officers and rsen left Las Vegas close to noon and arrived in Pocatello at 30 p.m. that same evening. (Tr. 355-356)

Larsen had breakfast before he left. (Tr. 628) When he rived in Pocatello he was given two hamburgers and a coke. r. 628, 1274)

Larsen testified that on certain occasions en route ck to Pocatello he received refreshments, including a doughnut. one occasion he was given coffee and a doughnut. (Tr. 344-45) so he drank a bottle of pop, and was able to smoke and did so the back seat. (Tr. 345)

Larsen further agreed that the officers told him that he ever wanted to stop and eat they would accede to his request. r. 347) Sheriff Parker stated that they asked him at least times if he wanted to stop and eat, to which he replied that was not hungry. (Tr. 1273) Larsen stated that on one occasion slept in the back seat for approximately 15 or 20 minutes. r. 357) Sheriff Parker believes that there were periods on return trip when Larsen dozed off. (Tr. 1270)

Appellant's brief claims that he was chained to the back at throughout the return trip. However, Larsen testified that y put hand cuffs on him and ran a waist chain around him. He not chained to the back seat and was able to move around. r. 342-43; 1276) The security devices were adjusted so that

could smoke and drink. (Tr. 345) Sheriff Parker stated that e security devices were acceptable standards for transporting isoners. (Tr. 1276)

On one occasion Larsen admitted the cuffs were removed le he consumed his coffee and doughnut. (Tr. 343-44) While ittedly the weather became uncomfortable his coat did offer e comfort. (Tr. 346) He was permitted to leave the vehicle the accompaniment of Officer Aikens in order to retire to the chroom to relieve himself. (Tr. 356) On arriving in Pocatello 8:30 that evening, he refused to make any telephone calls. r. 1252-53)

Appellant now concludes that his statements to the officers his return trip were not the product of his free and rational ice and thus, involuntary. Your Appellee cannot fathom sen's supposition that the instant facts even approach the tality of circumstances" or the prohibitive practices found *Davis*, *Clewis* and *Greenwald v. Wisconsin,* 88 S.Ct. 1152 (1968)

II

Appellant's second Specification of Error concerns ection of certain proof offered by him at his state jury trial. concern is specifically that the state trial court refused offer of proof sought to prove that a third party had made ra judicial statements constituting an admission that a third ty had admitted the commission of the same murder. The opinion the Idaho Supreme Court states at length appellant's argument the facts surrounding the offer of proof. (Tr. 71-77; *State v. sen* 91 Idaho 42, 46-49, 415 P.2d 685, 689-92) The Idaho Supreme

ourt adhered to the recognized, though disputed evidence rule, ejecting out-of-court third-party confessions without the ntroduction of other substantial evidence which tends to prove learly that the declarant is in fact the person guilty of the rime for which the accused stands charged.

Appellant then injects the argument that his constitutional ight of due process was violated because he was not allowed to resent his theory on the case.

Judge McNichols refuting that suggestion stated:

> "...It is clear from the record before us that no deprivation of any constitutional right is presented by the allegation of Paragraph VII of the petition and as to that paragraph the petition for a Writ of Habeas Corpus should be denied as being without merit as clearly demonstrated on the face of the record."
>
> (Tr. 1320)

The Federal Habeas Corpus Act is geared to the appearance o federal constitutional defects. Certainly the federal court is t the panacea of all disagreements with state court evidence ulings. See, for example, <u>United States v. Banmiller</u>, 199 F. Spp. 115 (E.D. Pa. 1961) and <u>Johnson v. Walker</u>, 199 F. Supp. 86 (.D. La. 1961).

III

Appellant's third Specification of Error is directed twards his belief that he did not receive a fair trial as guarantee o the Sixth and Fourteenth Amendments to the Constitution of the ited States. He contents that widespread prejudicial and flammatory publicity, generated by the news media, swept away

r right he may have possessed to obtain a fair trial in Bannock onty, Idaho.

Larsen never raised this issue in the Idaho state courts n it was absent from his first Petition for Writ of Habeas opus in the federal court. (Tr. 1-9 and 1320-22) Federal itrict Judge Ray McNichols refused to entertain consideration f this allegation because Larsen had not, contra to his assertion, xausted his state court remedies. Judge McNichols in his order, eying this issue without prejudice as to renewal in his court, icussed accurately that the State of Idaho had adopted a post-oviction statute patterned after the federal practice as developed ner 28 U.S.C. §2254. (Tr. 1320-22) Appellant's response to uge McNichols' holding is that he had exhausted all the state eedies that were avilable to him when he filed his first Petition n the federal courts on December 7, 1965. However, as expressed bve, this new and cognizable claim of deprivation of a constitu-inally guaranteed protection never appeared in his first petition n only came to the attention of the federal judiciary in his second eition of August 9, 1967. (Tr. 826-831) Idaho's <u>Uniform Post-oviction Procedure Act</u> was approved February 18, 1967. See dho 1967 Sess. Laws. Chap. 25, pgs 42-46 and <u>Idaho Code</u> Sections 9-4901 through 19-4911.

Your Appellee believes that Larsen has simply not shown nt under 28 U.S.C. §2254(b) he has exhausted the remedies avail-e in the Idaho state courts nor has he alleged an absence of an ilable state corrective process.

Furthermore, Appellant since the date of Judge McNichols' er has instituted in Bannock County under the <u>Uniform Post-</u>

nviction Procedure Act an application for relief based on his alegation of the lack of a fair and impartial trial. (*John Dee Lrsen* v. *Orvil Stiles, Acting Warden of the Idaho State Penitentiar ad the State of Idaho*, Case No. C-317, in the District Court of the Sxth Judicial District of the State of Idaho, in and for Bannock Cunty.

CONCLUSION

The burden is on Appellant to substantiate his position tat the federal trial court in quashing his second Writ of Habeas Crpus was clearly erroneous. Appellant's contentions have rceived extensive consideration by the Supreme Court of Idaho ad two adjudications by Federal District Judge Ray McNichols. Te lower court had before it twice the entire state court rcord and Appellee believes that Appellant has not convincingly rvealed to this Court that Judge McNichols was in error. Appellee des not deny Appellant's attempt to pursue all the judicial rmedies at his disposal but Appellee does believe all of his aguments have received adequate and valid treatment below.

Appellee respectfully requests that Appellant's appeal denied, and the order of the trial court be affirmed.

Respectfully submitted,

ALLAN G. SHEPARD
ATTORNEY GENERAL
STATE OF IDAHO

ROGER B. WRIGHT
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO

M. ALLYN DINGEL, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL
STATE OF IDAHO
1010 Bank of Idaho Building
BOISE, IDAHO

By ______________________
M. Allyn Dingel, Jr.
Special Assistant Attorney General

I certify that in connection with this brief, I have amined Rules 18, 19 and 39 of the United States Court of Appeals r the Ninth Circuit, and that, in my opinion, the foregoing ief is in full compliance with those rules.

M. Allyn Dingel, Jr.
Special Assitant Attorney General
State of Idaho
Attorney for Appellee

I hereby certify that I mailed a true and correct copy the foregoing Appellee's Brief to Richard R. Black, Attorney r Appellant, Box 470, Pocatello, Idaho on the 17 day of July, 68.

M. Allyn Dingel, Jr.
Special Assistant Attorney General
State of Idaho
Attorney for Appellee